

[*Adjiri v. Emory University*](#), 97-ERA-36 (ARB July 14, 1998)

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U.S. Department of Labor
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

ARB CASE NO. 97-135
(ALJ CASE NO. 97-ERA-36)
DATE: July 14, 1998

In the Matter of:

DR. ADOUDA ADJIRI,
COMPLAINANT,

v.

EMORY UNIVERSITY,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under Section 211, the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), codified at 42 U.S.C. §5851 (1988 and Supp. V 1993) and the regulations promulgated thereunder at 29 C.F.R. Part 24.¹ Complainant, Dr. Adouda Adjiri, alleged that Respondent Emory University (Emory) violated the ERA when it discharged her from employment. In the August 12, 1997 Recommended Decision and Order (R. D. and O.), the Administrative Law Judge (ALJ) determined that Complainant had failed to present evidence sufficient to make a *prima facie* case that Emory had discriminated against her in violation of the "whistleblower protection" provisions of the ERA. R. D. and O. at 19. The ALJ further

[Page 2]

concluded that Emory had presented "clear and convincing" evidence that it would have terminated Complainant's employment even in the absence of protected activity. *Id.* at 18, 19. Accordingly, the ALJ recommended that the complaint be dismissed.

The record in this case has been thoroughly reviewed. We find that it fully supports the ALJ's findings and conclusions that Complainant was not fired for engaging in activities protected by the ERA, but, rather, for her behavior toward other employees and her supervisor. R. D. and O. at 7. *Boschuk v. J. & L. Testing, Inc.*, ARB Case No. 97-020, ALJ Case No. 96-ERA-16, ARB Fin. Dec. and Ord., Sep. 23, 1997, slip op. at 1-2; *Nickerson v. Corpro Companies, Inc.*, ARB Case No. 97-030, ALJ Case No. 96-TSC-9, ARB Fin. Dec. and Ord., Jun. 30, 1997, slip op. at 1-2; *Remusat v. Bartlett Nuclear, Inc.*, Case No. 94-ERA-36, Sec. Fin. Dec. and Ord., Feb. 26, 1996, slip op. at 2; *Stockdill v. Catalytic Industrial Maintenance Co., Inc.*, Case No. 90-ERA-43, Sec. Fin. Dec. and Ord., Jan. 24, 1996, slip op. at 2.

BACKGROUND

Complainant began her employment with Emory in November 1993 in the Biology Department. She has a doctorate degree in genetics and physiology. In January 1996, Complainant transferred to Emory's Pathology Department, working under the supervision of Dr. Garth E. Austin (Austin) in his laboratory at the Veterans Administration (VA) Medical Center. *See* Hearing Transcript (Tr.)² at 169; R. D. and O. at 6. Complainant was an Emory employee; the position was funded through monies provided by the VA. *See* Tr. 172; R. D. and O. at 6.

Soon after commencing employment in the Pathology Department, Complainant noted several concerns regarding safety in handling radioactive materials in the lab. First, pipettes -- used to measure the amount of liquids for experiments -- were not labeled for use solely with radioactive materials. Second, the pipettes used for radioactive substances were not kept behind a shield. Third, Complainant noted the lack of a container for radioactive liquid waste, phosphorus and sulphur. Finally, Complainant was concerned that her co-worker, Dr. Weiguo Zhao (Zhao) allegedly told her to dispose of phosphorus waste in a cardboard box. Complainant testified that she raised these concerns with Zhao and that he became angry over her safety complaints. Later, Complainant alleged, Zhao insulted Complainant by calling her "nothing."³ *See* R. D. and O. at 2-3; Tr. 30-36.

Complainant took her safety concerns and the matter of Zhao's purported insults to the VA's program assistant, Margaret Williams. R. D. and O. at 3; Tr. 35-36. Regarding the nuclear material safety concerns, Margaret Williams directed Complainant to a VA Program Analyst, Patricia Bidgood (R. D. and O. at 3; Tr. 36-37), who immediately notified the Radiation Safety Office. *See* R. D. and O. at 3; Tr. 538. This was the only occasion that Complainant ever brought radiation safety concerns to Bidgood's attention. *See* Tr. 539.

[Page 3]

Thomas Roland Phillips, III (a VA health physicist working as the Radiation Safety Officer for the VA Medical Center) and James Davis (the VA Medical Center's Assistant Radiation Safety Officer) inspected Austin's lab. Following the safety inspection, the

pipettes used for radioactive substances were appropriately labeled; Zhao was directed to keep the pipettes behind shielding; and the radioactive waste containers were kept behind plexiglass shielding, which is sufficient to contain radiation from the types of waste used in Austin's lab. Complainant testified that her nuclear safety complaints were resolved to her satisfaction in February 1996. *See* R. D. and O. at 3; Tr. 55-56. Both VA Radiation Safety Officers testified that they did not inform anyone at Emory about Complainant's radiation safety complaints. *See* Tr. 133, 164.

Numerous personal conflicts occurred between Complainant and Zhao or Jipu Lu (Lu), Austin's lab technician, in the months following the radiation safety inspection (and the implementation of the remedial measures), continuing through July 10, 1996. Although the precise timing of some of the incidents is unclear, Complainant testified that after the safety inspection, Zhao placed "restrictions" on Complainant's work in the lab. *See* R. D. and O. at 3. Among the restrictions were Zhao's alleged directive that it was not necessary to turn on an ultraviolet light; that Complainant was forbidden by Zhao to touch anything in the lab "without problems;" and that Zhao turned off the computer printer. *Id.* Complainant's contention is that Zhao's motivation for "harassing" and "insulting" her was that he was not happy with the changes in the operation of the lab, which were the result of the safety inspection she initiated.

At some point after the safety inspection, Complainant placed a cardboard barrier between herself and Zhao "to keep him from harassing her." *Id.*; Tr. 80. Complainant also testified that she "did not want to -- to look at [Zhao's] face. . . ." Tr. 81. Complainant further testified that in order to keep from hearing Zhao's insults, she would put her fingers in her ears. Complainant testified that she placed her fingers in her ears on only one occasion (Tr. 79); Zhao testified that she blocked his conversations in this manner three times. Tr. 260.

On April 11, 1996 Complainant and Zhao had a dispute over Complainant's playing a radio too loudly for Zhao's liking. *See* Tr. 75-76; R. D. and O. at 4. This dispute culminated in Complainant contacting the VA's emergency response ("911") number. *Id.* A second confrontation between Complainant and Zhao occurred the following day -- April 12 -- over Complainant's failure to order materials for the lab. Complainant testified that she could not timely order materials that morning due to problems with an office computer and that Zhao became angry over the incident. Complainant went to the VA police department and filed a complaint over this incident. Tr. 75.

Austin, Complainant's supervisor, called Complainant on the telephone and requested her to come to his office to discuss the April 11 and 12 confrontations with Zhao. *See* Tr. 82. Complainant refused to go to Austin's office to discuss the situation in the lab and hung

up the telephone. *See* Tr. 82-83. Complainant felt that discussing the matters with her supervisor would not be useful.⁴

Complainant testified that she decided to stop communicating with Zhao in the spring of 1996 because he continued to insult her. She also testified that she had stated she could not be a "friend" of a person like Zhao. *See* Tr. 90; R. D. and O. at 4.

A meeting was held in June 1996 for the purpose of discussing and resolving the conflicts in Austin's lab. *See* R. D. and O. at 4. In attendance were Complainant, Zhao, Austin, a representative of the VA's employment relations office, and Antonio Laracuenta (Laracuenta), the VA's Research Administrator who monitored the progress in the laboratories. *Id.* At the meeting, Complainant demanded that Austin and Zhao be sanctioned. *See* Tr. 87. Austin testified that "she said that she felt that she ought to be made head of the lab and the other two people discharged." Tr. 415. Complainant denied ever saying this.

Complainant and another co-worker, Lu, were involved in another incident on July 10, 1996. Zhao was on vacation and had left instructions with Lu to redo an experiment. Zhao further directed that Complainant was not to have access to a particular scientific paper about the experiment, because there was a "contradiction" in the paper and Zhao did not want Complainant to use the contradiction against him. R. D. and O. at 11-12.

On July 10, Lu had placed the scientific paper on her desk and covered it with a notebook when she left the lab. Lu noticed Complainant taking the paper from her desk and requested that Complainant replace the paper. Complainant returned the paper and Lu then put the paper in her desk drawer. Later, Lu saw that Complainant again had the paper and was going to the photocopying machine with it. Lu explained that Zhao did not want Complainant to have the paper⁵ and again requested the paper's return. Complainant did not return the paper and Lu "reached out and took the paper from Complainant's hand and proceeded to go back to the lab." *Id.* at 12.

Complainant called Austin regarding the paper incident and Austin came to the lab to investigate the circumstances. Austin testified that, upon arriving at the door of the lab, he heard an ongoing argument between Complainant and Lu. Tr. 418. Upon entering the lab, Austin noticed a "red mark" on Complainant's arm, apparently "where she'd been grabbed when she was trying to Xerox an article." Tr. 419. Austin also testified that Lu was extremely upset after the run-in with Complainant and that she left the lab. Further, Austin directed Complainant to take two days off to calm down. Lu reported the incident to Laracuenta, who instructed her to document the incident in a "contact report." Lu submitted her report of the incident to Laracuenta the following day, July 11.

[Page 5]

Following the incident with Lu (which occurred on a Wednesday), Complainant took off work for the two days recommended by Austin, but afterward did not return to work

at the lab. Austin received a message from Complainant on the following Monday. She stated that she was "on strike and she was not coming back . . . [until Austin] made the laboratory satisfactory for her." Tr. 424. On July 19, 1996, Complainant sent Austin a letter, reiterating that she was "on strike" and would not return to the laboratory until safety and respect were guaranteed her. RX 20. She also noted that she would be reporting to either the library at the VA Medical Center or at Emory until her return to the laboratory. *Id.*

On July 10 Lu went to Laracuate's office and reported the incident with Complainant over the scientific paper to him. Laracuate then contacted Carol McMurtray (McMurtray), Emory's business manager in the Pathology Department for three years, and told her that some resolution of the situation in Austin's lab had to be reached, because the requirements of the Scarce Medical Needs Contract under which Complainant was employed were not being performed. *See* Tr. 511-512; 521-522. Although Laracuate, a VA employee, previously had been made aware of Complainant's February 1996 nuclear safety complaints, he did not inform McMurtray or anyone else in Emory's Pathology Department of those radiation safety complaints. *See* R. D. and O. at 15-16; Tr. 512. Complainant later came to see Laracuate and informed him that she was on strike. *See* Tr. 524. On July 22, 1996, Laracuate informed McMurtray that Complainant had not made an appearance for work in the lab for the past week. Austin also confirmed Complainant's absence from the lab.

On July 22, 1996, after being informed of the July 10 altercation and Complainant's failure to return to work at Austin's laboratory, McMurtray made the decision to terminate Complainant's employment. Tr. 184-185. In a meeting with Complainant on July 23, 1996, McMurtray informed Complainant of the termination. Tr. 185. McMurtray handed Complainant a notice of termination, but Complainant refused to accept the notice. Tr. 195. As summarized by the ALJ, Emory's reasons stated for the termination were:

the inability to get along with other co-workers, insubordination related to not being willing to communicate with the supervisor, Dr. Austin, and job abandonment. The insubordination referred to Complainant's refusal to talk to Dr. Austin when asked to come to his office while the failure to get along with other co-workers referred to reports that Complainant had been putting her fingers in her ears when other workers in the lab talked to her and fact that she put up a cardboard barrier as well as the failure to interact appropriately.

R. D. and O. at 8. McMurtray also testified that she was not contacted by anyone from the VA's Radiation Safety Office regarding Complainant's February 1996 safety complaints. *Id.*

On July 23, when Complainant was notified of her employment's termination, Complainant made no verbal complaint to McMurtray of having been retaliated against for her nuclear safety complaint in February 1996. Tr. 188. At the termination meeting, Complainant

presented a letter dated July 22, 1996, which also made no mention of her safety complaints playing a role in the termination decision. RX-22.

On July 24, 1996 Complainant filed a grievance (RX-23), protesting the decision to terminate her employment.⁶ The grievance was subsequently denied by Emory's acting Chairman of the Department of Pathology and Laboratory Medicine, John Alexander Bryan. Tr. 234; CX-2. Subsequently, Complainant filed a timely complaint with the U. S. Department of Labor, alleging that she had been discharged in violation of the whistleblower protection provision of the ERA.

DISCUSSION

The ALJ found that Complainant did not establish a *prima facie* case, and that "there is no evidence that [Complainant] was discriminated against for any of the safety concerns she voiced in January 1996." R. D. and O. at 16. In finding that the Complainant did not make a *prima facie* showing of discrimination, the ALJ essentially found that Complainant had produced no evidence of unlawful discrimination, and therefore had failed to meet her burden of persuasion.⁷ We agree.

Because this case was fully tried on the merits, it is not necessary to determine whether Complainant presented a *prima facie* case and whether Respondent rebutted that showing. See R. D. and O. at 5-9. *U.S.P.S. v. Aikens*, 460 U.S. 711, 713-714 (1983); *Roadway Express v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Final Dec. and Ord., Feb. 15, 1995, slip op. at 11 n.9, *aff'd sub nom. Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996). Once Respondent has produced evidence in an attempt to show that Complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question whether Complainant presented a *prima facie* case. Instead, the relevant inquiry is whether Complainant prevailed by a preponderance of the evidence on the ultimate question of liability. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Darty v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Dec., Apr. 23, 1983, slip op. at 7-8. If she did not, it matters not at all whether she presented a *prima facie* case. If she did, whether she presented a *prima facie* case is not relevant. With that in mind we turn to the issues in this case.

The ALJ found that Respondent presented convincing evidence that it had legitimate, nondiscriminatory reasons for terminating Complainant: her insubordination,

lack of cooperation with co-workers, and job abandonment.⁸ R. D. & O. at 15. The record repeatedly demonstrates continuing friction and conflict between Complainant and other

workers in the lab (Zhao and, to a lesser extent, Lu) during the months following the alleged protected activity. Complainant's insubordination toward Austin is also clear on the record. Finally, Complainant's job abandonment is equally clear.

With regard to Emory's reasons for terminating Complainant's employment, the ALJ found that:

[Emory] had ample valid and legitimate reasons for the termination. Complainant herself admitted to putting up a barrier between her work bench and Dr. Zhao's bench as well as putting her fingers in her ears when her co-workers tried to communicate with her. Furthermore, Complainant admitted to hanging up the phone on Dr. Austin and refusing to go to his office to discuss the problems in the lab. Additionally, there were two separate altercations^[9] which both involved Complainant and two of her co-workers.

* * *

Complainant also admitted that she did not follow the protocol shown to her by Dr. Zhao because she had her own protocol. Complainant additionally testified that she decided to stop communicating with Dr. Zhao at one point because the insults did not stop. This Court finds that all of these incidents show that Complainant was not in any way discriminated against because of her safety concerns, but was terminated because of her own actions of refusing to get along with her co-workers and supervisor.^[10]

R. D. and O. at 19.

Complainant did not prove by a preponderance of the evidence that her termination was even partially motivated by protected activities. Indeed, Complainant presented no evidence to support a conclusion that her purported protected activity played any role whatsoever in her discharge from employment. Moreover, the record demonstrates that

[Page 8]

McMurtray -- the Emory official who fired Complainant -- was not even aware of Complainant's safety complaints at the time of the termination decision. Thus, there is no evidence suggesting that Emory's decision to terminate Complainant's employment was motivated in part by Complainant's alleged protected activities, since McMurtray did not know of Complainant's alleged protected activities.

Complainant proceeded in this case *pro se*, and was accorded considerable latitude by the ALJ. Complainant did not meet the requisite standard of proof that the adverse action taken against her was, even in part, motivated by protected activity. We find, after reviewing the record and, notably, Complainant's own testimony at the hearing, that the ALJ's recommendation that the complaint should be dismissed is correct.

CONCLUSION

The ALJ's Recommended Decision and Order of August 12, 1997 is accepted because the Complainant did not establish that Emory violated the employee protection provision of the ERA. Accordingly, the complaint is **DISMISSED**.

SO ORDERED.

KARL J. SANDSTROM

Chair

PAUL GREENBERG

Member

CYNTHIA L. ATTWOOD

Acting Member

[ENDNOTES]

¹ These regulations were amended in 1998 to provide, *inter alia*, for review of ERA and other "whistleblower" complaints before the Administrative Review Board only upon the filing of an appeal by a party aggrieved by an Administrative Law Judge's decision. *See* 63 Fed. Reg. 6614 (Feb. 9, 1998). In this case, the Administrative Law Judge issued a recommended decision and order on August 12, 1997; accordingly, this matter is before the Board pursuant to the automatic review provision of the regulation at 29 C.F.R. §24.6(a) (1997).

² Other record citations used in this decision are "CX" (Complainant's Exhibit) and "RX" (Respondent's Exhibit).

³ Complainant testified that Zhao's remarks were to the following effect:

You are nothing. If you had been some -- if you had been somebody at Emory in biology, here you are nothing. You are not getting results. I'm better with [sic] you. I compete with you, I get better results than you and you are nothing.

⁴ So that's why I refuse to go to his office and talk about the fights. I needed someone else who does not belong to the lab to come between us. And I unfortunately I never had that one person, I never had that assistance from Emory.

Tr. 83.

⁵ Lu testified that she also informed Complainant that a copy of the paper -- which was apparently a document published in a magazine -- could be obtained from the library or from Austin. Tr. 374.

⁶ In her grievance, Complainant raised no issue that implicated retaliation for ERA-protected safety activities. Rather, Complainant alleged that she had been insulted by Zhao; sexually harassed by Austin; and insulted and assaulted by Lu. *See* Tr. 229; RX-23.

⁷ The ALJ also noted that a "recent decision raised the employer's burden from a preponderance of the evidence to clear and convincing evidence. *Yule v. Burns International Security Service*, 93-ERA-12 (Sec'y May 24, 1995)." R. D. and O. at 6. This standard was cited incorrectly by the ALJ. The "clear and convincing evidence" standard is applicable only in a "dual motive" case, *i.e.*, a case in which the evidence suggests that both legitimate and discriminatory motives played some role in the employer's action. *See* 42 U.S.C.A. §5831(b)(3)(D). Because we find that there was no discriminatory motive in Respondent's action, a dual motive analysis is unnecessary.

⁸ In denying Complainant's grievance, Bryan "pointed out to [Complainant] that that any one of these infractions alone would be grounds for disciplinary action and possible dismissal; and that taken together they constituted a situation in the laboratory which could not be continued to be tolerated." Tr. 234.

⁹ The record actually demonstrates at least three "altercations" between Complainant and her co-workers: the radio incident; the episode over ordering of laboratory materials; and the scientific paper confrontation.

¹⁰ The ALJ also noted that "[t]he evidence indicates that Complainant was terminated because of ... job abandonment." This observation is based on the record evidence, including Complainant's admissions, that Complainant did not return to work in Austin's lab following her altercation with Lu over copying Zhao's research paper. *See* discussion at pp. 5, 6, *supra*. There was record evidence that Emory prepared (and submitted to the Georgia Department of Labor for unemployment insurance purposes) two written termination notices: one specified "job abandonment" as a contributing cause to the termination(CX-8) while in the second the "job abandonment" cause had been deleted (CX-9). Complainant's grievance of her termination was decided on August 22, 1996 by Dr. John Bryan; he concluded that the termination was justified, in part, by Complainant's job abandonment. CX-10.